

July 22 2009

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CLERK OF THE SUPREME COURT
STATE OF MONTANA

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FILED

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STATE OF MONTANA

ATTORNEYS FOR RESPONDENT

BEFORE THE COMMISSION ON PRACTICE
OF THE SUPREME COURT OF THE STATE OF MONTANA

IN THE MATTER OF STEVEN S. CAREY,
An Attorney at Law,
Respondent.

) Supreme Court Cause No. PR09-0384
) ODC File No. 08-194

ANSWER

COMES NOW Respondent, and for his Answer to the Complaint states and alleges
as follows:

1. The following paragraphs are admitted: 1, 2, 5.
2. The following paragraphs are responded to as they were when originally plead
in the Complaint: 3, 15, 20, 23.

3. Answering the allegations contained in paragraph 4, it is admitted with the
following qualifications: Answering Respondent has never reviewed the Anderson file.
During the time it was being handled at the Carey Law Firm exclusively by his associate
Tracey Morin. Ms. Morin took the file with her when she left employment with the Carey
Law Firm in January, 2008. Therefore, Respondent has no direct information regarding
the details of the underlying claims of Ms. Anderson.

4. Answering the allegations contained in paragraphs 6 and 7, they are admitted
upon information and belief only, as Answering Respondent had very limited contact with
the Anderson file, which being handled almost exclusively by Respondent's employee
attorney Tracey Morin. Mr. Carey literally had less than five minutes involvement with this

1 file while it was in the Carey Law Firm. Morin removed the Anderson file with her when
2 she ceased employment with the Carey Law Firm in January, 2008.

3 5. Answering the allegations contained in paragraph 8, they are admitted on belief
4 only. Answering Respondent had no contemporaneous information regarding any claim
5 of Austin or amounts Anderson may have received from Austin for property damage.
6 Respondent learned, after the fact, that insurer Austin apparently claimed a right of
7 reimbursement or subrogation.

8 6. Answering the allegations contained in paragraph 9, the first and third sentences
9 are admitted. Regarding the second sentence, Answering Respondent has insufficient
10 information upon which to base an affirmance or denial, and therefore denies the
11 allegations of the third sentence.

12 7. Answering the allegations contained in paragraph 10, they are admitted, except
13 to the extent that they imply Respondent had any intent to create a subterfuge by
14 intentionally depositing funds that should have borne an endorsement from Austin or
15 pursuant to an agreement by Austin that the funds could be deposited without its
16 endorsement.

17 Due to the large number of checks which pass through Respondent's hands, and
18 interruptions which can cause temporary inattention to detail, Respondent did not notice
19 that Austin had been placed as a payee on the check. The processing bank did not notice
20 Austin was a payee, either. Because Respondent did not know this had occurred, the
21 check was deposited, and, of course, Respondent did not inform Austin of the firm's receipt
22 of the check or obtain Austin's endorsement prior to any negotiation, as Respondent was
23 unaware that Austin had been placed on the check as a payee.

24 8. Answering the allegations contained in paragraph 11, they are admitted.
25 However, Answering Respondent affirmatively alleges that he was unaware of the
26 transactions described in this paragraph at the time they occurred, and his understanding
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1 of them has been gained only after the payments described in paragraph 11 had already
2 been made.

3 9. Answering the allegations contained in paragraph 12, Answering Respondent
4 has no information regarding them, and, despite reasonable inquiry, is unable to ascertain
5 their truth or falsity, and therefore denies them.

6 10. Answering the allegations contained in paragraphs 13 and 14, Answering
7 Respondent denies any willful violation of Rule 1.15, although, for the reasons set forth in
8 paragraph 7, above, he admits not promptly notifying Austin of the receipt of the funds, as
9 Answering Respondent did not recognize that Austin's name had been placed on the
10 check. Answering Respondent affirmatively alleges that the funds were placed in trust.
11 Later, associate Morin wrote checks out of the trust account. Answering Respondent was
12 unaware in this timeframe that Allied Insurance Company had placed Austin Insurance
13 Company's name on the check at issue.

14 Answering Respondent affirmatively alleges that Answering Respondent's intent is
15 a factor to be considered both in whether a violation of Rule 1.15 occurred, pursuant to the
16 Preamble of Montana's Rules of Professional Conduct at (20), and therefore Answering
17 Respondent denies these violations as stated. However, if his intent is irrelevant and mere
18 inadvertent conduct is a violation of this Rule, then Answering Respondent admits that
19 violations occurred, as he could not notify Austin of something he was unaware of, or
20 segregate funds he did not recognize Austin might claim an interest in.

21 11. Answering the allegations contained in paragraph 16, Answering Respondent
22 has no direct knowledge of the matters alleged. Respondent was told that Austin might
23 involve the bank because the bank allowed deposit of the check without Austin's
24 endorsement.

25 12. Answering the allegations contained in paragraph 17, the first sentence is
26 denied. Regarding the second sentence, it is denied that a check was sent "on the same
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1 day" as the alleged conversation between Answering Respondent and Bernhardt, as
2 Answering Respondent denies that conversation occurred. Mr. Carey has never spoken
3 to Mr. Bernhardt regarding this case. Regarding the remainder of the allegations of the
4 second sentence, Answering Respondent's associate, Tracey Morin, sent a letter of
5 explanation and a check for \$5,000 to Austin pending the ultimate resolution of all disputes
6 between Anderson and Austin. A much larger underinsured motorist claim and a bad faith
7 claim were pending between Anderson and Austin, which would subsume the relatively
8 smaller dispute over any property damage subrogation right Austin claimed. Associate
9 Morin took a strong position that Austin was not entitled to any funds, as stated in her letter
10 of June 15, 2006:

11 The enclosed check does not represent Ms. Anderson's
12 concession that Austin Mutual is entitled to this money. Quite
13 the contrary. Ms. Anderson firmly believes that she is entitled
14 to the money and Austin Mutual's tactics are putting their
15 insured in a negative position. Certainly, the depositing of the
16 check in our account was a simple error with no malintent
17 involved. Austin Mutual's choice to penalize Ms. Anderson for
18 that is inappropriate. Ms. Anderson will be including the losses
19 that this particular check should have covered in her demand
20 to Austin Mutual.

21 Ultimately, Austin Mutual apparently agreed that it had no right to receive any
22 subrogation for Ms. Anderson's property damage, paying out its entire underinsured
23 motorist limit, plus an additional \$75,000, without any credit for any property damage paid.

24 13. Answering the allegations contained in paragraph 18, Answering Respondent
25 is unable to admit or deny the allegations contained in the first sentence, despite
26 reasonable inquiry. Answering Respondent was not in contact at any time with Ms.
27 Anderson regarding her case, as her claims were being handled by Ms. Morin. However,
28 Ms. Morin's June 16, 2006 letter to Mr. Bernhardt was shown as copied to Ms. Anderson,
29 providing her at least contemporaneous information regarding the circumstances
30 surrounding that payment. It is unknown to Answering Respondent if Ms. Morin discussed

1 those circumstances with Ms. Anderson prior to June 16, 2006, however, the excerpted
2 portion referenced Ms. Anderson's "belief."

3 Answering the allegations contained in the second sentence of paragraph 18, it is
4 denied that Answering Respondent "charged" Ms. Anderson for the \$5,000 which had been
5 sent to Austin Mutual as a temporary accommodation and suspension of that portion of the
6 dispute pending the outcome of the entire underinsured motorist claim. Respondent
7 affirmatively alleges, upon information and belief, that the \$5,000 payment was made to
8 Austin as a litigation expense pending the outcome of the larger underinsured motorist
9 claim. Reimbursement for the Carey Law Firm for that litigation expense was sought by
10 sending evidence of that expenditure to Anderson's then-attorney at the time Anderson
11 settled her claims with Austin. Answering Respondent then received full reimbursement
12 for that \$5,000 litigation expense, and assumed that Ms. Anderson and all concerned
13 agreed that the \$5,000 litigation expense was properly repaid to Answering Respondent's
14 firm. If no agreement was reached, any disputed funds could simply have been
15 segregated out for resolution after further discussion. Attorney Morin had left Carey Law
16 Firm employment, and taken the Anderson file with her. Answering Respondent was
17 therefore attempting to reconstruct what had happened years earlier, and what the \$5,000
18 payment had been, without the benefit of the firm's file, and without Answering Respondent
19 ever having worked on the Anderson claim, which had been handled exclusively by
20 attorney Morin. Answering Respondent explained what he thought had occurred, despite
21 lack of direct information, to Ms. Anderson's then-attorney Cynthia Smith, by letter of July
22 21, 2008.

23 14. The allegations contained in paragraphs 19, 21, 22, and 24 are denied.

24 15. Answering the allegations contained in paragraph 25, it is denied that the
25 \$5,000 payment referred to in paragraph 24 was a violation of Rule 1.8(e). Regarding the
26 allegations of that "42 advances from September, 2005 through September, 2008
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1 inclusive" were made, it is assumed in this Answer that those advances refer to
2 transactions Answering Respondent advised the investigator of the Office of Disciplinary
3 Counsel of during the investigation of this matter. Based upon that assumption, Answering
4 Respondent can offer the following:

- 5 • In the fall of 2007, Answering Respondent became concerned about attorney
6 Morin's handling of litigation, completely unrelated to any client advances.
7 Answering Respondent Carey began to investigate Ms. Morin's file handling
8 and, as part of that investigation, reviewed all cost accounts for all files Ms.
9 Morin was then handling. During that investigation, Answering Respondent
10 discovered that, unbeknownst to Answering Respondent, advances had
11 been made to clients Sharon Conger, Shelly Anderson, and Lucas Nelson.
12 Answering Respondent then held a face-to-face meeting with Ms. Morin to
13 confront her about these advances in the fall of 2007. While Answering
14 Respondent signed two of the checks for these clients, which he ultimately
15 learned were advances to them, he was not aware that the checks were for
16 client advances when they were presented to him for signature. Upon
17 learning of these advances, Answering Respondent instructed Ms. Morin to
18 immediately cease making them. She left the firm soon thereafter.
- 19 • Regarding client Ron Hansen, the circumstances of that payment are as
20 follows. Answering Respondent was handling a workers' compensation
21 claim for Mr. Hansen, and he was receiving bi-weekly payments in the fall of
22 2008. Mr. Hansen, an amputee, appeared at Answering Respondent's office
23 unannounced on September 12, 2008, indicating he was in desperate
24 circumstances because his workers' compensation insurer had not sent his
25 check on time. He indicated a relative who was dear to him had just died
26 and that he wanted to attend the relative's funeral out-of-state, but needed
27 his workers' compensation check to afford travel there. He was crying as he
28 told Answering Respondent this. Answering Respondent called the adjuster
handling Hansen's file immediately. The adjuster verified that the check was
late, apologizing, and indicated the check would be sent out immediately.
Based upon this representation, and the emotional circumstances Mr.
Hansen was in, Answering Respondent gave him the amount of his late
check so that he could attend his relative's funeral. The bi-weekly check very
shortly thereafter and deposited it into the firm's account. Mr. Hansen was
already a client when this occurred, and was in desperate straits, no promise
of payment of any expense, other than the advancement of costs, was ever
made to induce him to become a client or to continue as a client.
- Regarding client Shawna Sniff, the payment to her occurred as follows. Ms.
Sniff had claims which were settled in stages. She had already received a
settlement for the first stage, and would be receiving a further settlement. In
July of 2008, during the ongoing transaction, she contacted Answering
Respondent concerned that her ex-husband, whom she had been hiding
from, was trying to find her and her child. She was afraid of him, and said
she needed immediate funds to leave the area for her own and her child's
protection. Answering Respondent provided her \$1,000 in order to move to

1 another state. She ultimately received the anticipated second stage of
2 settlement, and the funds were reimbursed.

3 • Regarding client Brandao, the circumstances are as follows. Answering
4 Respondent had gotten a settlement for Mr. Brandao, and was confident he
5 would be receiving a second portion, somewhat similar to Ms. Smith's
6 circumstances. Litigation Mr. Brandao was involved in was in part being
7 defended by one of Mr. Carey's former respected partners. The Brandao
8 case was completely ready for trial when presented to the defense, and
9 Answering Respondent believed settlement would be imminent, as the case
10 was strong and was completely prepared, including all expert opinions. The
11 expectation for an early settlement was not met. Defense counsel was
12 inactive, did not respond to the Court's deadlines, and the case came to a
13 halt. During this period, one of Answering Respondent's office staff
14 approached him asking if there was "anything he could do" for the Brandaos
15 in the interim, as their circumstances were very difficult. Answering
16 Respondent then paid \$500 a month to Brandao for several months to try to
17 alleviate her circumstances. Answering Respondent always anticipated that
18 these payments would be extremely short-term, but it turned out not to be so.

19 Respondent recognized that co-signing a bank loan would have been the
20 correct approach. Respondent believed the payment to Brandao would be
21 very short-term on the mistaken belief the case would be settled quickly and
22 repayments made quickly. The Brandaos were already clients when this
23 occurred, and no promise or suggestion was ever made to them that
24 payments would be made during the pendency of their litigation to entice
25 them to become clients. The matter of payments during the pendency of
26 litigation came up after they had already been clients for some time, a
27 substantial settlement of a portion of their case had been achieved.

28 WHEREFORE, Answering Respondent requests:


1. That an informal hearing be held on the allegations of the Complaint;
2. That the adjudicatory panel make a report of its findings and recommendations;

and

3. That the adjudicatory panel rule upon such motions and such discovery as may
come before it in the course of these proceedings.

DATED this 22nd day of July, 2009.

DRAKE LAW FIRM, P.C.

BY: 
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P. O. Box 1181
Helena, MT 59624-1181

1 **CERTIFICATE OF SERVICE**

2 I, Curt Drake, attorney for Respondent Steven S. Carey, hereby certify that I mailed
3 a true and correct copy of the **ANSWER**, postage fully prepaid by U. S. Mail, on this 22nd
4 day of July, 2009, to the following:

5 Shaun R. Thompson, Esq.
6 Office of Disciplinary Counsel
7 P. O. Box 1099
8 Helena, MT 59624-1099

9 Ms. Shauna Ryan
10 Commission on Practice
11 Montana Supreme Court
12 323 Justice Building, 215 North Sanders
13 P. O. Box 203002
14 Helena, MT 59620-3002

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Curt Drake